

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

APRIL SESSION, 1996

FILED

May 10, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,)

C.C.A. NO. 03C01-9510-CC-00297

Appellee,)

VS.)

BLOUNT COUNTY

JEFF BEASLEY,)

HON. D. KELLY THOMAS, JR.
JUDGE

Appellant.)

(Sentencing)

ON APPEAL FROM THE JUDGMENT OF THE
CIRCUIT COURT OF BLOUNT COUNTY

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OPINION FILED _____

AFFIRMED

DAVID H. WELLES, JUDGE

OPINION

This is an appeal as of right pursuant to Rule 3 of the Tennessee Rules of Appellate Procedure. The Defendant entered pleas of guilty to thirteen counts of aggravated burglary, one count of attempted aggravated burglary, ten counts of theft of property valued at more than one thousand dollars, and three counts of theft of property valued at more than five hundred dollars. In exchange for his guilty pleas to these various felonies, the Defendant received an agreed effective sentence of eight years as a Range I standard offender.¹ The manner of service of the sentences was left to the discretion of the trial judge. The trial court denied the Defendant's request for a sentence alternative to incarceration and ordered the sentences served with the Department of Correction. The Defendant appeals from the refusal of the trial court to allow his sentence to be served either on probation or in the community corrections program. We affirm the judgment of the trial court.

When there is a challenge to the length, range or manner of service of a sentence, it is the duty of this court to conduct a de novo review with a presumption that the determinations made by the trial court are correct. Tenn. Code Ann. § 40-35-401(d). This presumption is "conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." State v. Ashby, 823 S.W.2d 166, 169

¹Two of the Defendant's four-year sentences for aggravated burglary were ordered to be served consecutively pursuant to the plea agreement. All other sentences were ordered to be served concurrently.

(Tenn. 1991). The Sentencing Commission Comments provide that the burden is on the appellant to show the impropriety of the sentence.

Our review requires an analysis of (1) the evidence, if any, received at the trial and sentencing hearing; (2) the presentence report; (3) the principles of sentencing and the arguments of counsel relative to sentencing alternatives; (4) the nature and characteristics of the offense; (5) any mitigating or enhancing factors; (6) any statements made by the defendant in his own behalf; and (7) the defendant's potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-102, -103 and -210; State v. Smith, 735 S.W.2d 859, 863 (Tenn. Crim. App. 1987) .

The Defendant's numerous convictions grew out of the burglaries of some thirteen residences during an approximate three-month period of time. Among the items stolen were shotguns, rifles, pistols, televisions, VCR's, jewelry, knives, cameras, guitars, money, various electronic equipment, miscellaneous building supplies, a satellite receiver, and a weed eater.

The presentence report reflects that the Defendant was thirty-three years old and married. He finished the eleventh grade and has been regularly employed. He apparently has no prior criminal convictions. He was arrested once for possession of marijuana, but the charges were dismissed because of his cooperation with law enforcement as an informant. He reported a history of regularly using marijuana on a daily basis for fifteen years prior to his arrest on these multiple burglary and theft charges.

At his sentencing hearing, the Defendant testified that he lived with his wife and two step-sons. Once apprehended, the Defendant readily confessed to the various burglaries and thefts. He and his co-defendants, one of whom was his wife, cooperated with the authorities in recovering some of the stolen property. He stated that he and the co-defendants would simply ride around and look for houses to burglarize. The proceeds from the burglaries were apparently used for living expenses and to buy marijuana. The burglaries occurred during a time that the Defendant was regularly employed and making around eleven dollars an hour.

In denying the Defendant probation or community corrections, the trial judge emphasized the Defendant's long history of regular marijuana usage and the large number of burglaries involved.

The State argues that because the Defendant is statutorily eligible for probation, he is thus ineligible for a community corrections sentence pursuant to Tennessee Code Annotated section 40-36-106(a). Among other requirements, this section provides that in order to be eligible for a community corrections sentence, an offender must be a person who, but for community corrections, would be incarcerated in a correctional institution. Tenn. Code Ann. § 40-36-106(a)(1). Because the Defendant is eligible for probation, the State argues that the Defendant does not qualify for community corrections because he would not necessarily be incarcerated in a correctional institution. We reject this argument. We find nothing to indicate that the Legislature intended that an offender who is eligible for probation is therefore ineligible for a community correction sentence.

The State cites no case law in support of its argument and we can find

none. We note that before an offender may be sentenced to community corrections pursuant to Tennessee Code Annotated section 40-36-106(c), the offender must be eligible for probation. State v. Staten, 787 S.W.2d 934, 936 (Tenn. Crim. App. 1989). A defendant is eligible for probation if he is sentenced to eight (8) years or less and has not been convicted of a few excluded offenses. Tenn. Code Ann. § 40-35-303(a). The eligibility requirements for community corrections are more detailed, but there is no statutory limitation concerning length of sentence. Tenn. Code Ann. § 40-36-106(a)-(c). A community corrections sentence is thus available as an option for certain non-violent offenders who either are (a) not eligible for probation or (b) not good candidates for probation even though technically eligible for probation. Community corrections is another option which may be utilized to alleviate prison overcrowding by allowing local supervision of offenders who otherwise would be incarcerated in a penal institution.

The Defendant argues that the trial court erred by not allowing him to serve his sentence either on probation or in a community corrections program. The sentencing of this Defendant is governed by the Sentencing Reform Act of 1989. Through the enactment of Tennessee Code Annotated section 40-35-102, the legislature established certain sentencing principles which include the following:

(5) In recognition that state prison capacities and the funds to build and maintain them are limited, convicted felons committing the most severe offenses, possessing criminal histories evincing a clear disregard for the laws and morals of society, and evincing failure of past efforts at rehabilitation shall be given first priority regarding sentencing involving incarceration; and

(6) A defendant who does not fall within the parameters of subdivision (5) and is an especially mitigated or standard offender convicted of a Class C, D or E felony is presumed to be a favorable

candidate for alternative sentencing options in the absence of evidence to the contrary.

Tenn. Code Ann. § 40-35-102.

The Defendant was convicted of Class C, D, and E felonies which carry with them the statutory presumption that he is a favorable candidate for alternative sentencing options in the absence of evidence to the contrary. Even though these felonies may be quite serious, the Legislature has provided that there is a presumption of eligibility for alternative sentencing options.

The principles of sentencing reflect that the sentence should be no greater than that deserved for the offense committed and should be the least severe measure necessary to achieve the purposes for which the sentence is imposed. Tenn. Code Ann. § 40-35-103(3)-(4). The court should also consider the potential for rehabilitation or treatment of the Defendant in determining the sentence alternative. Tenn. Code Ann. § 40-35-103(5).

As the Tennessee Supreme Court stated in State v. Ashby:

When the stated minimal requirements are met, a defendant is presumed "in the absence of evidence to the contrary to possess capabilities for rehabilitative alternative sentencing options." Guidance as to what will constitute "evidence to the contrary" under subsection (6) is found in T.C.A. § 40-35-103(1). Sentences involving confinement should be based on considerations that "(c)onfinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct," "(c)onfinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses," or "(m)asures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant." T.C.A. § 40-35-103(1)(A)-(C).

Ashby, 823 S.W.2d at 169.

In the case sub judice, the Defendant committed numerous aggravated burglaries during an approximate three-month period. His motivation appears to have been at least in part to obtain money to support his long-term illegal drug use. Because of the large number of crimes committed, his criminal acts are of “an excessive or exaggerated degree.” State v. Travis, 622 S.W.2d 529, 534 (Tenn. 1981); see also, State v. Vonedith Lavern Tellis, Hamilton County No. 1167 (Tenn. Crim. App., Knoxville, December 6, 1990). The trial judge observed that “. . . a person that goes on a several months spree of breaking into thirteen houses needs to be confined to the penitentiary.” The judge obviously determined that confinement was necessary to avoid depreciating the seriousness of the numerous offenses. As previously noted, the trial court’s determination of the manner of service of the Defendant’s sentence is clothed with a presumption of correctness. We cannot conclude that the trial judge erred or abused his discretion in denying the Defendant probation or a community corrections sentence.

The judgment of the trial court is affirmed.

DAVID H. WELLES, JUDGE

CONCUR:

GARY R. WADE, JUDGE

WILLIAM A. BARKER, JUDGE